113 (2)

No. 10-276

In the Supreme Court of the United States

ROBERT C. BRUNER, ET AL.,

Petitioners,

v.

BERT HARTSFIELD, IN HIS OFFICIAL CAPACITY AS PROPERTY APPRAISER OF LEON COUNTY, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Florida First District Court of Appeal

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BRIEF IN OPPOSITION FOR RESPONDENTS FLORIDA DEPARTMENT OF REVENUE; GARY NIKOLITS, PROPERTY APPRAISER OF PALM BEACH COUNTY, FLORIDA; AND FRANK DESGUIN, PROPERTY APPRAISER OF CHARLOTTE COUNTY, FLORIDA

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QUESTION PRESENTED

Whether Florida's ad valorem taxation cap on annual increases to the assessed valuations of property used as a homestead and corresponding portability provision violate the right to travel under the Privileges and Immunities Clause of the U.S. Constitution?

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OPINION BELOW

The opinion of the Florida First District Court of Appeal, *Bruner v. Hartsfield*, is reproduced in the Petitioner's Appendix ("Pet. App.") at App. 1 and is reported at 23 So. 3d 192 (Fla. Dist. Ct. App. 2009), *review denied*, 37 So. 3d 846 (Fla. 2010).

STATEMENT

This case involves a federal constitutional challenge to provisions of the Florida Constitution — commonly known as the "Save Our Homes" ("SOH") amendment — and its implementing Florida statute[1]

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[1] The constitutional provisions are set forth in article VII, sections 4(d)(1) and (8) of the Florida Constitution, which was renumbered in 2008 (SOH was previously located in article VII, section 4(c)). The implementing statute is section 193.155 of the Florida Statutes. The homestead exemption, which extends to owners of property used as a "permanent residence," exempts the first $25,000 of the property's assessment (later increased in 2008). Fla. Const. art. VII, § 6; Fla. Stat. § 196.031. "Permanent residence" is defined in Florida law as a person's "true, fixed, and permanent home." Fla. Stat. § 196.012(18).

[2] Petitioners abandoned their sections 1983 and 1988 arguments on appeal.

[3] Many of the traditional grounds for granting review are not asserted by petitioners, nor could they be — no circuit split exists; nor does any conflict exist among the state courts on the question; nor does any conflict exist with this Court's precedents. Instead, petitioners' only ground for review is their assertion that SOH violates the right to travel under the

that create exemptions from ad valorem taxation for real property used as a Florida homestead. These laws provide that a person who owns and uses real property as a homestead in Florida receives favorable tax treatment in two ways. First, the homestead property is eligible for the lesser of a three percent cap or the percentage change in the Consumer Price Index (whichever is less) on the amount by which the yearly-assessed value of the property may increase. Second, the laws create a portability feature that allows a portion of a property owner's existing homestead exemption to be transferred when the owner acquires a new homestead in Florida.

Petitioners are Florida residents who qualified for Florida's homestead exemption. They allege that they pay higher property taxes than owners of similarly situated and valued properties who acquired their homestead exemptions years earlier when housing prices were lower. Petitioners claim that the higher taxes they pay are unconstitutional, alleging Florida law violates their right to travel protected by the Privileges and Immunities Clause. The Florida trial and intermediate appellate courts rejected these contentions; the Florida Supreme Court declined to review those decisions.

The degree to which the SOH cap might benefit homestead owners in Florida depends upon the market conditions affecting the particular homestead, as of January 1 each tax year. In a market with increasing home values, the cap will generally provide homeowners and their families some degree of protection from the possibility of

escalating property taxes that might force them from their permanent residences. In a market with declining home values, the cap may have little or no effect.

In 2008, Florida voters approved an amendment to the Florida Constitution that added an exemption on the value of homestead property between $50,000 and $75,000, thereby potentially providing an additional exemption for eligible properties. Fla. Const. art. VII, § 6(a). Additionally, the amendment made portions of the SOH cap portable, meaning that portions of a property owner's existing homestead exemption may be transferrable to his or her newly-purchased and newly-established Florida homestead. *Id.* § 4(d)(8). Like the SOH cap, the benefit of this portability feature may or may not exist from year to year, and depends on the market conditions affecting the particular homestead property, as of January 1, each year. Fla. Stat. § 192.042(1).

Eligibility for SOH protections is based solely on the use of the property as the owner's homestead on January 1 of each tax year. *Id.* §§ 196.011(1)(a), 196.031. First-time applicants are required to furnish their social security number and proof of ownership. *Id.* § 196.011(1)(b). They are not asked how long they have lived in the State nor is duration of residence a consideration. Generally, a person must make initial application for SOH between January 1 and March 1 of the year for which the exemption is sought. *Id.* § 196.011(1)(a). Without further application, upon receiving the homestead exemption, filers become eligible for the SOH

assessed value cap and the potential for portability of a portion of their exemption if they sell their home and establish another Florida homestead. *Id.* § 193.155. The cap and the portability features are dependent on the continued use of the real property as the owner's homestead.

Within the last six years, the petitioners chose to make Florida their permanent residence, and voluntarily sought and were granted exemptions on their newly-qualifying homestead properties. Pet. App. 24a-26a. They filed suit challenging the SOH assessment cap and its portability feature, asserting that it unconstitutionally disadvantages newer residents of Florida. Pet. App. 44a-45a. Petitioners attempted to bring their action on behalf of a class of similarly situated residents who migrated to Florida within the four years preceding the filing of the complaint. Pet. App. 31a. They claimed that they have little or no homestead exemption benefits in contrast to the larger exemption benefit of longer-term Florida residents who purchased their properties years ago; they claimed this disparity is heightened by the new portability feature of the homestead exemption. Pet. App. 24a. Asserting that SOH violates their state and federal constitutional rights to equal protection and their right to travel under the Privileges and Immunities Clause, petitioners sought a declaratory judgment, a permanent injunction against the enforcement of these provisions, a refund of taxes paid under SOH and relief pursuant to 42 U.S.C. § 1983 and

attorney's fees pursuant to 42 U.S.C. § 1988.[2] Pet. App. 50a-66a.

The trial court dismissed the claims with prejudice. Pet. App. 10a. It found the decisions in *Nordlinger v. Hahn*, 505 U.S. 1 (1972), and *Reinish v. Clark*, 765 So. 2d 197 (Fla. Dist. Ct. App. 2000), were "applicable and dispositive" of the petitioners' claims. Pet. App. 12a-13a. The SOH provisions have a rational and legitimate basis "unrelated to residency" and, the trial court continued, the provisions "apply to all citizens regardless of the length of time Florida has been his or her residence." Pet. App. 13a-14a. The court noted that long-term and short-term residents "start off on the same footing" when acquiring homestead properties, "and the protections against tax increases are the same based upon market conditions and the value of the property as determined by appraisal and assessment from year to year." Pet. App. 14a. Petitioners' section 1983 claims were dismissed as moot. Pet. App. 15a.

Florida's First District Court of Appeal agreed with the trial court's analysis on the constitutional claims. Pet. App. 6a. It held the decisions in *Nordlinger* and *Reinish* disposed of the issue of the constitutionality of the SOH provisions; it likewise concluded that the portability feature did not alter that analysis. Pet. App. 5a-6a.

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[2] Petitioners abandoned their sections 1983 and 1988 arguments on appeal.

A petition for discretionary review was filed in the Florida Supreme Court. That court declined to accept jurisdiction. Pet. App. 19a.

ARGUMENT

The issues presented do not warrant this Court's review for a number of reasons.[3] First, the constitutional provisions challenged — commonly known as the "Save Our Homes" ("SOH") amendment — do not violate the right to travel under the Privileges and Immunities Clause. No length of residency is required to qualify for and begin receiving SOH benefits. Rather, upon purchasing a home and obtaining homestead status, each person — whether a lifelong Florida resident or one who has just moved here from another State — becomes eligible to receive exactly the same benefits under the SOH provisions. The Florida First District Court of Appeal found that a durational residency argument against SOH is meritless, having considered and rejected virtually identical challenges to SOH in *Reinish v. Clark*, 765 So. 2d 197 (Fla. Dist. Ct. App. 2000), *review denied*, 790 So. 2d 1107 (Fla.), *cert. denied*, 534 U.S. 993 (2001), and *Lanning v. Pilcher*, 16 So. 3d 294 (Fla. Dist. Ct. App. 2009), *review denied*, 37 So. 3d 847 (Fla. 2010).

Second, these decisions are entirely consistent with this Court's jurisprudence. The right to travel decisions of this Court cited by the petitioners are

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[3] Many of the traditional grounds for granting review are not asserted by petitioners, nor could they be — no circuit split exists; nor does any conflict exist among the state courts on the question; nor does any conflict exist with this Court's precedents. Instead, petitioners' only ground for review is their assertion that SOH violates the right to travel under the Privileges and Immunities Clause.

inapt because in those cases, the State based the benefits awarded on the length of time a person lived in the State, which is not a requirement for Florida homestead exemption eligibility. Because the decision below is consistent with settled law on the right to travel, review is unwarranted.

1. The right to travel claim as petitioners have framed it rises and falls on their underlying assertion that the SOH provisions are somehow tied to or conditioned on the length of residency of an applicant for a homestead exemption. But it is not disputed that the only qualification for the exemption is that the relevant *property* be used as the applicant's homestead on January 1 of any particular year. The prior residence or status of the *applicant* matters not; applicants who are permanent residents — like the petitioners — are eligible whether they have lived in Florida one day, a decade, or their entire lives.

This case is wholly controlled by the Court's decision in *Nordlinger v. Hahn*, 505 U.S. 1 (1992). In that case, the Court reviewed a constitutional challenge to California's acquisition value approach where similar properties had different tax burdens due to different acquisition values that were merely "incidental" to the actual purpose of the State's tax system. *Id.* at 9. The approach also provided for caps on assessment increases and portability. *Id.* at 5. As here, a resident of the State challenged the assessment system because "longer term property owners pay lower property taxes reflecting historic property values, while newer owners pay higher

property taxes reflecting more recent values." *Id.* at 6.

In rejecting the resident's equal protection challenge, the Court applied a rational basis review to the equal protection claim and found that at least two rational bases existed for the property tax amendment. *Nordlinger*, 505 U.S. at 12. First, the State had an interest in "local neighborhood preservation, continuity, and stability." *Id.* The State "legitimately can decide to structure its tax system to discourage rapid turnover in ownership of homes and businesses." *Id.* Second, an existing homeowner has "vested expectations" that are "more deserving of protection than the anticipatory expectations of a new owner at the point of purchase" because the new owner can evaluate the tax ramifications prior to buying. *Id.* at 12-13.

The Florida First District Court of Appeal's decision in *Reinish*[4] is also dispositive of the issues raised here. In *Reinish*, out-of-state residents who owned non-homestead real property in Florida for seasonal or vacation use challenged Florida's homestead exemption claiming that SOH violates, among other constitutional provisions, the Privileges and Immunities Clause. The court held that the SOH structure affords tax benefits based on the "*use* of the property rather than the *user*." *Reinish*, 765 So. 2d at 205. This critical distinction led the court to conclude that Florida's homestead exemption treated all

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[4] Both the Florida Supreme Court and this Court declined to review the First District Court of Appeal's decision. *See* 790 So. 2d 1107 (Fla. 2001), and 534 U.S. 993 (2001).

persons the same and that "there is no durational residency requirement." *Id.* The key issue in *Reinish* and this case is the same: whether the State identically treats all persons who obtain the benefits of SOH. The answer is resoundingly that it does.

Plaintiffs base their constitutional analysis on the faulty premise that SOH creates horizontal inequities because it is an alleged durational residency requirement. Pet. 26. This same argument was rejected in *Reinish*, 765 So. 2d at 213. SOH does not interfere with any fundamental right because "it does not preclude non-residents from purchasing, enjoying, or disposing of Florida residential property" and it does not *"infringe upon the Clause's guarantee that individuals may migrate between States to live and work."* *Id.* at 209, 210 (citation and quotation marks omitted) (emphasis added). Under SOH, all persons are eligible for the same tax benefits as soon as they establish a homestead residence, regardless of how long they have lived in Florida.

The essence of petitioners' horizontal inequities argument is that two neighbors, with similar or identical houses, could be paying different amounts of taxes because they bought their homes at different points in time. But the residential housing market — not state tax policy — creates differences between the neighbors' property values and thereby the amount of taxes owed. The value of properties

purchased at different times can vary from year-to-year based on market conditions.[5]

Longer-term homesteaders are subject to the same rules as new homesteaders. Both are eligible equally for whatever benefits result from being included in the SOH system, depending entirely on the ebbs and flows of the market for residential real estate. Under the cap, both receive the same assurance upon purchasing a homestead in Florida that a precipitous rise in home prices is less likely to force them out of their homes due to an inability to pay tax assessments. With portability, both receive the same assurance that they may at some point move within Florida and transfer a portion of their existing exemption to a new homestead. SOH provides all purchasers of homestead property the advantage of knowing with a high degree of certainty what their property taxes will be at the time of purchase and in subsequent years under the cap. *Nordlinger*, 505 U.S. at 13 (finding "[a] new owner has full information about the scope of future tax liability before acquiring the property, and if he thinks the future tax burden is too demanding, he can decide not to complete the purchase at all"). Because *Nordlinger* and *Reinish* are controlling and

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[5] As an example, a homestead owner who purchased her property twenty years ago bears the market risk from year-to-year of possible gains and losses. If her property gains in value in excess of the cap, she becomes eligible for favorable tax treatment (i.e., a capped assessed value) and the potential transfer of a portion of her exemption to a new Florida homestead (portability); if her property declines in value, she bears the risk of losing this favorable treatment as well as the loss of her property's value.

squarely on point, this Court's review is unwarranted.

2. Unlike SOH, the cases upon which petitioners rely all involve situations where eligibility for or the amount of state benefits was *based* on a person's duration of residence in the State. As shown, SOH and its portability feature are merely benefits flowing to any person who obtains a homestead exemption; no durational residency test applies. A homestead exemption is available to new and longtime Florida residents alike, as long as they are using the property on January 1 of a particular year as their homestead. The benefit of the cap and portability feature may or may not exist from year to year and depends on the market conditions affecting the particular homestead property as of January 1 each tax year.

In *Zobel v. Williams*, 457 U.S. 55, 57 (1982), by contrast, the Court struck down on equal protection grounds Alaska's plan to pay mineral income from a state fund based explicitly upon the number of years each resident had lived in the State. The disparate treatment was not, as petitioners assert, a mere "product" of the relevant statutes. Pet. 16. Instead, duration was the basis for the distinction. *Zobel*, 457 U.S. at 59 ("the dividend statute creates fixed, permanent distinctions between an ever-increasing number of perpetual classes of concededly bona fide residents, *based on how long they have been in the State*.") (emphasis added). The other cases cited by the petitioners also conferred benefits explicitly on the duration of residency. *See* Pet. 15-16. The amount of a particular homestead exemption is both

explicitly set out in the SOH provisions as reliant on, and therefore is entirely a product of, the use of the property.

Saenz v. Roe, 526 U.S. 489 (1999), does not alter the analysis. In *Saenz*, the Court invalidated a statute that *explicitly* calculated welfare benefits on the basis of the duration of the applicant's residency in California. *Id.* at 505 ("The classifications challenged in this case — and there are many — are defined *entirely* by (a) the period of residency in California and (b) the location of the prior residences of the disfavored class members.") (emphasis added). A homestead exemption has nothing to do with the length of a property owner's Florida residency; it relates solely to the use of the property as a homestead on January 1 of each tax year.

Given that duration of residency plays no role in the availability of the homestead exemption in Florida, this case does not warrant further review. Florida courts have repeatedly held that SOH imposes no durational residency requirement; as such, no right to travel is implicated. Thus, no basis exists for applying heightened scrutiny to the SOH system.

3. This case also suffers from similar standing deficiencies that existed in *Nordlinger*, in which this Court found that "prudential standing principles" prohibited the plaintiff from raising her right to travel challenge because she had been living, first as a renter, then as a homeowner, in the State prior to raising her claims. 505 U.S. at 10-11. Petitioners imply that this same standing concern is not present

in this case. Pet. 10. But the facts in *Nordlinger* are identical to the situation here. Petitioners were Florida residents at the time of their challenge. SOH had no effect on petitioners' right to travel to or settle in the State. *See Nordlinger*, 505 U.S. at 10. Nor can petitioners here assert that SOH thwarts the right of others to move to this State and buy a home, another point the Court found important in *Nordlinger*. *Id.* at 11. Given the questionable standing of the petitioners, this case is not a good vehicle for the Court to review the questions they present.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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